NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MENGPING LU, Petitioner, v. MICHAEL B. MUKASEY, Attorney General, Respondent.	No. 04-76080 Agency No. A95-877-323 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 6, 2008
Pasadena, California

Before: PREGERSON and WARDLAW, Circuit Judges, and LEIGHTON[**], District Judge.

Mengping Lu, a native and citizen of China, petitions for review of a decision of the Board of Immigration Appeals ("BIA"), which dismissed his appeal of an order by an Immigration Judge ("IJ") denying Lu's application for asylum,

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

withholding of removal, and relief under the Convention Against Torture ("CAT"), based on an adverse credibility determination.

We review the decision of the BIA, which agreed with the "outcome reached by the [IJ]" but did not, expressly or by citation to *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), adopt or incorporate any of the reasons cited by the IJ in its decision. *Plasencia-Ayala v. Mukasey*, No. 06-73728, slip op. 1767, 1775 (9th Cir. Feb. 7, 2008) ("Where the BIA conducts a de novo review and issues its own decision, rather than adopting the IJ's decision as its own, we review the BIA's decision."). Our review is therefore limited to the grounds on which the BIA explicitly relied.[1] *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004).

---

[1] Not only does the dissent refuse to limit its review to the grounds upon which the BIA relied, it would uphold the adverse credibility determination under reasoning relied upon by neither the BIA *nor the IJ*. This is plainly contrary to well-established Ninth Circuit precedent. *Marcos v. Gonzales*, 410 F.3d 1112, 1116 (9th Cir. 2005) ("Our review [of an IJ's adverse credibility determination] focuses only on the actual reasons relied upon by the IJ."); *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) ("[W]hen each of the IJ's or BIA's proffered reasons for an adverse credibility finding fails, we must accept a petitioner's testimony as credible.").

The IJ did not rely on *any* of the alleged inconsistencies that the dissent would use to uphold the adverse credibility determination. The IJ never mentioned the different addresses, postal codes, and phone numbers in Lu's employment records, nor did the IJ note any inconsistency in Lu's asylum application regarding the date his passport was issued. The dissent's reliance on these supposed discrepancies is therefore misplaced.

The BIA's independent adverse credibility determination is not supported by substantial evidence. *Rivera v. Mukasey*, 508 F.3d 1271, 1274 (9th Cir. 2007) ("We review adverse credibility findings under the substantial evidence standard."). The BIA noted for the first time on appeal that the return address on a letter submitted as corroborating evidence did not match the address on the author's residence card. However, the residence card was issued seven years before the letter was written, so the discrepancy does not reasonably lead to the inference that the letter was fabricated. Moreover, the IJ did not rely on this supposed inconsistency in his decision, and Lu was never given the opportunity to explain why the addresses differed. Therefore, the BIA's reliance on this ground violated Lu's due process rights. *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) ("[Due process requires] that the BIA . . . provide a petitioner with a reasonable opportunity to offer an explanation of any perceived inconsistencies that form the basis of a denial of asylum.").

The BIA also impermissibly relied upon pure speculation when it concluded that Lu would have been unable to escape China "without incident" using his own "validly issued passport and visa." *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000) ("Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence."). Lu testified three

times that he was put "under surveillance" after being arrested and beaten for practicing Falun Gong, but the government never inquired about what form this surveillance took. Nothing in the record suggests that Lu was under such heavy surveillance that he would necessarily be apprehended when he escaped from China.

The government concedes that the BIA's third basis for its adverse credibility finding—Lu's failure to seek asylum in Japan during his twenty-four-hour stopover on the way to the United States—"is really only one of opinion, and not supported by any independent evidence." Moreover, we have specifically held that a petitioner's "failure to apply for asylum in any of the countries through which he passed . . . prior to his arrival in the United States does not provide a valid basis for questioning the credibility of his persecution claims." *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986); *see also Ding v. Ashcroft*, 387 F.3d 1131, 1140 (9th Cir. 2004) (finding "no basis" to assume "that an individual who truly fears persecution in his homeland will automatically seek asylum in the first country in which he arrives").

Finally, the BIA relied on the lack of corroborating evidence as to Lu's continuing Falun Gong practice in the United States. However, "when each of the IJ's or BIA's proffered reasons for an adverse credibility finding fails, we must

accept a petitioner's testimony as credible" and additional corroboration is generally not required. *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004). In rare cases, the failure to produce "non-duplicative, material, easily available corroborating evidence," without any credible explanation for such failure, can support an inference that the evidence would have discredited the petitioner, *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000), but this narrow exception to the general rule does not apply here. Lu volunteered corroborating evidence, the veracity of which the BIA did not challenge, that he had practiced Falun Gong in China, so any further corroboration would have been duplicative. Moreover, when asked why he did not bring his roommates to corroborate his current practice in the United States, Lu responded, "I never thought of that. I can ask them to come." That Lu was insufficiently prescient about the type of additional corroborating evidence the IJ would require fails to justify an inference that his roommates would have testified unfavorably or that Lu is not currently practicing Falun Gong, especially given that he offered to have them come testify as soon as the government attorney brought it up.

Because none of the BIA's proffered grounds supports its adverse credibility determination, we must take Lu's testimony at face value. *Kaur*, 379 F.3d at 890. Lu testified that, as a direct result of his Falun Gong practice, he was detained,

beaten, electrically shocked, dragged into a courtyard, and tied to a tree for three hours. *See Zhang v. Ashcroft*, 388 F.3d 713, 720–21 (9th Cir. 2004) (holding that the persecution of Falun Gong practitioners constitutes persecution both on the basis of spiritual and religious belief and on the basis of political opinion). Because the BIA never reached the issue, we remand this matter for a determination of whether, accepting Lu's testimony as credible, he is eligible for asylum, withholding of removal, or CAT relief. *See INS v. Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam); *Singh v. Ashcroft*, 362 F.3d 1164, 1172 (9th Cir. 2004).

PETITION FOR REVIEW GRANTED.